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~~No. 2391~~

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STANLEY G. FONSECA,

Appellant,

v.

BERNARD W. WATSON, JR.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal is from a final judgment in an action brought for personal injuries suffered in an automobile-pedestrian accident on June 27, 1963.

Plaintiff is a citizen of California (TR. 64-65) and defendant is a citizen of Hawaii (TR. 24).

The jurisidiction of the district court was based upon section 1332 of the Judicial Code (Title 28, U.S.C. § 1332).

The case was tried before the Honorable C. Nils Tavares without a jury from February 28, 1966 through March 2, 1966, and a judgment was entered on May 3, 1966. A motion to amend findings of fact and conclusions of law was made on May 13, 1966 and was denied by the court on May 20, 1966. Defendant's notice of appeal was filed on June 2, 1966.

This court has jurisdiction under section 1291 of the Judicial Code (Title 28, U.S.C. § 1291).

STATEMENT OF THE CASE

During the evening of June 27, 1963, defendant was driving along Kalakaua Avenue in Waikiki in a kokohead or easterly direction. He was tired and sleepy at the time (TR. 32). As he approached Lewers Street he noticed that the traffic light was green in his favor (TR. 26). He was going from 5 to 15 miles per hour (TR. 33 and 34). He then yawned, his head went down and his eyes closed (TR. 34 and 35). At or about the time he brought his head up, he saw two pedestrians in front of him, slammed on his brakes and collided with the pedestrians (TR. 37-39). Plaintiff was one of the pedestrians. The pedestrians were in the crosswalk across Kalakaua Avenue on the ewa or west side of Lewers Street when they were hit. When defendant's automobile stopped after colliding with the pedestrians the rear-end of the automobile was still in the aforementioned crosswalk. (TR. 14).

When defendant's car struck plaintiff, plaintiff's left leg was broken (TR. 67).

The district court found that defendant had been grossly negligent in driving his automobile and that plaintiff was not guilty of contributory negligence.

Plaintiff was hospitalized at Tripler Army Hospital in Hawaii until September 1963, when he was transferred to the Balboa Naval Hospital in San Diego, California (TR. 93). In October 1963, plaintiff was put on limited duty for Special Services at the Naval Station in San Diego (TR. 93). He continued on this duty until he was again hospitalized at Balboa Hospital on March 30, 1964 (EX. P-2). According to the Summary of Case History contained in the Report of Board of Medical Survey dated April 24, 1964, included in Exhibit P-2, plaintiff had no complaints when he was admitted to Balboa Hospital on March 30, 1964, and the Board found that plaintiff was "ready to resume the full and arduous duties of his rate" (EX. P-2). Plaintiff was released from active duty June 15, 1964 (TR. 101). Although plaintiff testified that he was "discharged" from the Navy (TR. 101) it was stipulated that he was actually released to inactive duty (TR. 189). It was also stipulated that this discharge from active duty was not caused by the accident of June 1963 (TR. 189).

At the time of the accident in June 1963, plaintiff's Navy base pay was $150 a month (TR. 104). He was also receiving sea and submarine pay of $78 a

month (TR. 104). Subsequently a military pay raise increased plaintiff's base pay from $150 to $190 a month (TR. 105).

After plaintiff's release from active duty he applied for various jobs, and finally in July 1964 he accepted a job in a linoleum store (TR. 105-09). Plaintiff also attended Pasadena City College during 1964 and 1965 (TR. 110).

A doctor called as a witness by the plaintiff testified that plaintiff's left leg had suffered a slight degree of medial bowing at the fracture site (TR. 124-26) and that there was some probability that this would cause difficulty in the future (TR. 133).

The district court found for plaintiff and made findings of fact and conclusions of law (R. 43-48) which included, among others, the following:

> "7. Plaintiff suffered an impairment of earning capacity during the remainder of his enlistment for which he is entitled to damages as follows:
>
> a. Navy base pay - six months from June to December inclusive, 1963, at $150.00 per month $900.00
>
> b. Navy base pay - five months from January, 1964 to June 6, 1964, at $190.00 per month 950.00

c. Eleven months for sea and sub pay, or hazardous duty and sea pay at $78.00 per month $858.00

8. Plaintiff suffered and continues to suffer a loss of civilian wages after his release from active duty for which he is entitled to damages as follows:

a. Loss of civilian wages after release from active duty -- from June, 1964, to February 1966, inclusive -- or one year and 9 months, less 9 months of school attendance, 40 hours per week times 50 weeks (the Court finding that plaintiff during that period suffered a loss of $1.00 per hour in earning power due to the accident and the reluctance of employers to employ a person with an injury of that late vintage; this finding, however, not being based upon the hearsay testimony as to what the doctor for Pacific Telephone Co. told plaintiff as to the reason for his not being hired.) . . $2,000.00

b. Future loss of civilian pay, for an estimated additional 3 years, less 9 months each year of college work, or 9 months, at $1.00 per hour, for 36 weeks, or $40.00 times 36 weeks . . . $1,440.00

9. Plaintiff was furnished medical and hospital expenses by the United States, the reasonable value of which was $3,500.

10. Defendant had been and was at the time of collision driving his car in a grossly negligent manner, and heedless of the safety of others, for which exemplary damages of $1,750 are assessed against defendant.

11. By reason of the collision and plaintiff's injuries, plaintiff is entitled to general damages as follows:

a. Initial injury, June 27, 1963, violation of person, striking, thrown into air, with both bones of left leg broken and dangling, shock, fright, pain and suffering $5,000.00

b. 8-2/3 months, approximately, in cast from June 28, 1963, to approximately 18 March, 1964, pain, suffering, embarrassment, discomfort and inconvenience . . . $4,500.00

c. After removal of cast on March 18, 1964, to time assigned back to duty, including painful and discomforting physiotherapy and painful and discomforting efforts to regain normal use of leg, from 18 March, 1964 to 6 May, 1964 (approximately 1-2/3 months), not including any damages for deformity . . . $1,000.00

d. From 6 May, 1964 to March 2, 1965, occasional pain, inconvenience and suffering, approximately 10 months, excluding deformity . . . $ 500.00

e. Future pain and suffering, with reasonable medical certainty of arthritic conditions which will be caused by bowing of leg bones and tilting of ankle bones . . . $2,000.00

f. Deformity from scarring, bowing and lumping of leg . . . $2,500.00"

Thereafter, judgment was entered for plaintiff for $26,898 (R. 49).

Defendant moved to amend the findings of fact and conclusions of law in respect to the exemplary damages and to reopen the trial so as to permit defendant to introduce evidence as to his financial standing (R. 53). These motions were denied in an order filed May 23, 1966 (R. 62).

SPECIFICATIONS OF ERRORS

The district court erred:

1. In finding that plaintiff was entitled to damages in the amount of his Navy base pay from June 1963 to June 1964, in the total amount of $1,850 (Finding of Fact No. 7, R. 45).

2. In finding that the plaintiff suffered a loss of civilian wages after release from active duty from June 1964 to February 1966, amounting to $2,000 (Finding of Fact No. 8a, R. 46).

3. In finding that the plaintiff will suffer a future loss of civilian pay for an estimated additional three years at the rate of $1.00 per hour amounting to $1,440 (Finding of Fact No. 8b, R. 46).

4. In finding that plaintiff was entitled to damages for future pain and suffering, with a reasonable medical certainty of arthritic conditions which will be caused by the bowing of leg bones and the tilting of ankle bones, in the amount of $2,000 (Finding of Fact No. 11, R. 47).

5. In finding that defendant was grossly negligent in the manner in which he drove his automobile and in assessing exemplary damages against defendant in

the sum of $1,750 (Finding of Fact No. 10, R. 46).

6. In denying defendant's motion to reopen the evidence to permit defendant to introduce evidence as to his financial standing (R. 62).

SUMMARY OF ARGUMENT

The court erred in allowing as damages the amount of plaintiff's base pay from the Navy from June 1963 through June 1964 in the total amount of $1,850 because plaintiff received his full Navy base pay during this period and therefore suffered no loss and because the so-called collateral source doctrine does not apply where, as here, the injured person performs services while he continues to receive his regular pay, and therefore the amount of the judgment should be reduced by $1,850.

The court erred in allowing plaintiff $2,000 as loss of civilian wages from June 1964 to February 1966 computed at the rate of $1.00 per hour, forty hours per week because there is no evidence in the record supporting any such loss, and therefore the amount of the judgment should be further reduced by $2,000.

The court erred in allowing plaintiff as loss of future civilian pay for three years the sum of $1,440 computed at the rate of $1.00 per hour, for forty hours per week for a total of 36 weeks because there is no evidence in the record supporting any such loss,

and therefore the amount of the judgment should be further reduced by $1,440.

The court erred in allowing plaintiff $2,000 for future pain and suffering and arthritis because there is no substantial evidence in the record that plaintiff would with reasonable medical certainty suffer any futu pain or arthritis, and therefore the amount of the judgment should be further reduced by $2,000.

The court erred in awarding plaintiff $1,750 in exemplary damages because there was no evidence that defendant was guilty of such negligence as to warrant the imposition of exemplary damages, and therefore the amount of the judgment should be further reduced by $1,750. Even if there were a basis for such damages the amount allowed was grossly excessive.

The court erred in refusing to reopen the trial to permit defendant to introduce evidence as to his financial standing because such evidence should be considered in connection with the allowance of exempla damages.

ARGUMENT

I. INTRODUCTION

This appeal is governed by Rule 52(a) of the Federal Rules of Civil Procedure, as amended. The rule provides, in part:

> "(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . ."

The Supreme Court in the case of United States v. United States Gypsum Co., 333 U.S. 364, 68 Sup. Ct. 525, 92 L. Ed. 46 (1948), defined the scope of appellate review by stating that, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Id. at 395. This court has been faced with the application of Rule 52(a) in many cases, e.g., Joseph v. Donover Co., 261 F.2d 812 (9th Cir. 1958); Smallfield v. Home Ins. Co., 244 F.2d 337 (9th Cir. 1957), and has reversed the findings of the trial court where there was no evidence to support its findings.

E.g., Los Angeles Trust Deed & Mortgage Exch. v. Securities & Exch. Comm'n, 264 F.2d 199 (9th Cir. 1959); United States Nat'l Bank v. Fabri-Valve Co., 235 F.2d 565 (9th Cir. 1956). In the Fabri-Valve case, this court said:

> "While every intendment must be given the district court's findings, and especially so with respect to damages, yet this court believes the damages awarded classify as clearly erroneous. . . ." Id. at 570.

In the case of Stacher v. United States, 258 F.2d 112 (9th Cir. 1958), this court made the statement that:

> "Appellee is entitled to the benefit of all favorable inferences from the facts proved relative to the issue of residence. If, when so viewed, there was substantial evidence to sustain the findings, then the judgment may not be reversed by this Court unless against the clear weight of the evidence or unless influenced by an erroneous view of the law." (Emphasis added.)

From this court's own precedent it is thus well established that there must be substantial evidence in the record to support a district court's findings of fact or such findings will be deemed "clearly erroneous" and set aside. Furthermore, the statements just quoted from Stacher v. United States, id., show that a finding will be set aside if it was "influenced by an erroneous view of the law."

II. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF WAS ENTITLED TO DAMAGES IN THE AMOUNT OF HIS NAVY BASE PAY FROM JUNE 1963 TO JUNE 1964, IN THE TOTAL AMOUNT OF $1,850.

Finding of Fact No. 7 reads in part as follows:

> "7. Plaintiff suffered an impairment of earning capacity during the remainder of his enlistment for which he is entitled to damages as follows:
>
> a. Navy base pay - six months from June to December inclusive, 1963, at $150.00 per month $900.00
>
> b. Navy base pay - five months from January, 1964 to June 6, 1964, at $190.00 per month . . . . . $950.00"

Plaintiff gave the only testimony upon which the above finding could possibly be based. It was established by his testimony that at the time of the accident he was on active duty in the United States Navy and continued on active duty until he was released to inactive duty June 15, 1964 (TR. 101 and 189). There was no evidence that plaintiff lost any part of his Navy pay as a result of the accident and although it might be inferred that he lost his hazardous duty pay and sea pay, there was absolutely no testimony that the plaintiff lost any part of his Navy base pay from the time of the accident until his release from active duty. Since

plaintiff lost no part of his base pay he was not entitled to any damages measured by his base pay.

Evidently the court was relying upon the so-called "collateral source" doctrine in awarding damages for lost income although there was no actual loss of income. This doctrine provides that compensation or indemnity received by an injured plaintiff from a collateral source wholly independent of the denfendant, as from insurance, workmen's compensation, social security and the like, cannot be set up by defendant is mitigation or reduction of plaintiff's damages. Where the claim is for lost wages and the wages continue to be paid after the accident, however, the doctrine does not apply during any period in which the plaintiff performs services for those wages even though as a result of the injuries the extent or quality of the services is less than before.

In Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 Atl. 958 (1904), the court held that where the injured plaintiff, after the injury, performed services for his employer, similar to, but less efficient than, those performed before the injury, the payment of his salary by his employer was not a gratuity, and he could not recover from the defendant for loss of earning power during the time he performed services. The court said:

> "It is clear . . . that during all the time he was receiving payment, except for a few weeks when consulting surgeons, he was performing services for his company. . . . The company continued to pay his regular salary after his injury, and, so far as his own testimony and that of the treasurer shows, the payment was for services, inefficient, perhaps, compared to those before his injury, but still for services rendered by him to the company. . . ." Id. at 961.

In the case of Moon v. St. Louis Transit Co., 247 Mo. 227, 152 S.W. 303 (1912), the plaintiff, the president of a corporation, after sustaining an injury, was unable to attend to business duties daily, but he did go to the office once or twice a week and attended certain meetings. His salary was paid to him regularly, without any deduction. The court held that, in the absence of evidence showing that the plaintiff did not perform the services incumbent on him as president, the salary payments were not gratuities, and that the plaintiff could not recover for loss of time from the defendant. The court, in distinguishing cases where the plaintiff's salary is paid as a gratuity, stated:

> "It may . . . be conceded that in case one is employed for wages or in a subordinate capacity on a salary, and his right to the agreed compensation depends

> upon his rendition of specific services, and his failure to render such services ends his right to compensation, then, in case of his injury and consequent inability and failure to work, he has no legal claim to compensation, and, if money is paid him, it is on its face a mere gratuity, and falls within the rule. Before the rule as to gratuities can apply in a particular case, however, the evidence must show the payment was a gratuity. The burden is on respondent to show loss of time and its value. If the . . . Company was not entitled to his whole time the value, if any, of the excess might be recovered, but there is no evidence in this record justifying a recovery on such theory. The only evidence in connection with loss of time relates to time lost from respondent's duties as president of the . . . Company, and there having been no evidence he owed any duty he did not perform, and the respondent's own testimony showing he received during the whole time the amount agreed to be paid him as salary and that he drew it and the company paid it and charged it to him as salary, the rule as to gratuities on the record before us has nothing to do with the case. There was no evidence justifying the instruction authorizing recovery for loss of time. . . ." Id. at 305.

In the present case plaintiff received his full base pay from the date of the accident in June 1963 until his release from active duty in June 1964. During most of this time he was actually on duty, albeit limited

duty, performing services. The Report of Board of Medical Survey dated September 30, 1963, included as part of Exhibit P-2, stated that plaintiff was at that time "fit for duty" and recommended that he be assigned to limited duty. Plaintiff testified that in October 1963 he went to work for "Special Services" at the Naval Station at San Diego (TR. 93). Plaintiff continued on limited duty until he was readmitted to the hospital on March 30, 1964 (TR. 96 and EX. P-2). According to the Report of Board of Medical Survey dated April 29, 1964, included in Exhibit P-2, plaintiff was then ready "to resume the full and arduous duties of his rate" and it was recommended that he be returned to full duty. The report also states that plaintiff was informed of the Board's findings and did not wish to make a rebuttal. (EX. P-2). Plaintiff was then returned to the Naval Station at San Diego where he remained on duty until his release to inactive duty June 15, 1964 (TR. 101).

Thus the uncontradicted evidence is that during most of the period from the date of the accident in June 1963 until plaintiff's release to inactive duty in June 1964 he was on duty or limited duty and performing services. Thus the collateral source doctrine is in-

applicable and since there was no actual loss of Navy base pay, there was no basis for the district court's awarding $1,850 in damages measured by plaintiff's base pay. Therefore, the amount of the judgment should be reduced by $1,850.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE PLAINTIFF SUFFERED A LOSS OF CIVILIAN WAGES AFTER HE WAS RELEASED FROM ACTIVE DUTY FROM JUNE, 1964 TO FEBRUARY, 1966 IN THE AMOUNT OF $2,000.

Finding of Fact No. 8a is as follows:

> "8. Plaintiff suffered and continues to suffer a loss of civilian wages after his release from active duty for which he is entitled to damages as follows:
>
> "a. Loss of civilian wages after release from active duty -- from June, 1964, to February, 1966, inclusive -- or one year and 9 months, less 9 months of school attendance, 40 hours per week times 50 weeks (the Court finding that plaintiff during that period suffered a loss of $1.00 per hour in earning power due to the accident and the reluctance of employers to employ a person with an injury of that late vintage; this find, however, not being based upon the hearsay testimony as to what the doctor for Pacific Telephone Co. told plaintiff as to the reason for his not being hired.). . . . . $2,000.00"

All of the evidence as to plaintiff's civilian employment and attempts to obtain civilian employment and plaintiff's civilian wages appears on pages 105 through 113 of the transcript of plaintiff's testimony. This evidence may be summarized as follows. A week after his release from the Navy plaintiff applied for a job at Pacific Telephone Company in California (TR. 105). He took some tests and had a physical by a private doctor (TR. 105) and another physical by a doctor at the com-

pany's Olive Street office (TR. 106). Plaintiff was turned down for the job (TR. 106) and over defendant's objection, was allowed to testify, "they [the company] said they wouldn't hire me because of my leg" (TR. 107). Early in July 1964 plaintiff worked for Counselor Book Corporation for two days and stopped because his leg would swell up from standing (TR. 108). Plaintiff then went to work in a linoleum store in Alhambra, California where he was still working at the time of trial (TR. 108). His starting pay was $1.50 per hour which was increased to $1.75 per hour in July 1965 (TR. 109). Plaintiff testified he had sought a job with the telephone company "working on the frame" and when asked what his starting pay would have been with the telephone company was allowed, over defendant's objection, to answer:

> "I am not sure of the exact amount
> It was around two and a half an hour."
> (TR. 109).

Plaintiff attended Pasedena City College for the fall semester in 1964 and the spring semester in 1965, at the same time working part time for the linoleum company (TR. 110). Plaintiff also had been offered a job with a company called "Square Deal" early in July 1964, but turned it down because it involved standing on an assembly

line 8 hours a day (TR. 110-11). In November 1964 plaintiff "inquired" about a job at Southern California Edison Company. He testified that he was turned down but gave no reason for this (TR. 112). Plaintiff also inquired about a job at Sperry Rand Corporation, but he did not testify as to when this was or as to the results of the inquiry. Plaintiff was asked if it had been his intention after getting out of the Navy "to go back to school anyway?" and he answered:

> "I was trying to work days and go to school nights. As it is, I worked, I went to school day and night and worked in the linoleum store for one semester. And I had enough money so I could go through the next semester just going to school." (TR. 112-13).

Other than the testimony just summarized there is nothing in the record relating to plaintiff's employment, and it is submitted that this testimony does not

support a finding that the plaintiff suffered a loss of civilian wages in the amount of $1.00 per hour.

In order to be entitled to damages for loss of earnings, plaintiff had to prove the amount of his loss with reasonable certainty:

> "But although specific items of evidence will vary from case to case, the value of the lost time must be proved with reasonable certainty, so that the jury will not have to base an award on mere speculation. If the reviewing court, after considering the evidence, believes that the jury's verdict covering the loss of plaintiff's time prior to the trial was based upon speculation, the court will not sustain the verdict." 22 Am. Jur. 2d Damages § 91, at 133.

> "A claim of damages for lost or diminished earning capacity must be supported by satisfactory proof of the fact of such impairment, the extent thereof, and, in the case of a claim for permanent impairment of earning power, by satisfactory evidence of the permanency of the injury; and the proof should be made by the best evidence available. Proof with

> certainty or mathematical exactness is not required, nor need the proof be clear and indubitable; but such damages cannot be left to mere conjecture. Proof of the age, health, and habits of the party injured does not, standing alone, ordinarily afford a sufficient basis on which to rest a verdict for loss of earning power; nor can pecuniary loss from a claimed diminution in earning capacity or in ability to perform services be determined solely on proof of a diminution in capacity to labor." 25 C.J.S. Damages § 162, pp. 826-27.

The requirement of "reasonable certainty" has not been met in respect to the claim for loss of earnings.

Plaintiff was offered jobs by the linoleum company, by Counselor Book Corporation and by the Square Deal Company. He gave no reason for his rejection by Southern California Edison Company nor did he state the outcome of his inquiry to Sperry Rand Corporation. Therefore, the only possible basis in the record for Finding of Fact No. 8a that plaintiff lost a dollar per hour in earning capacity was plaintiff's testimony (a) that he was not hired by Pacific Telephone Company because of his leg (b) that the telephone company job paid "around two-and-a-half an hour" and (c) that when he started with the linoleum company he was paid $1.50 per hour.

Plaintiff's testimony as to why he was not hired was objected to as hearsay. Plaintiff might

have been told that he was not hired on account of his leg while the rejection might actually have been for some other reason. For example, plaintiff testified that he had to take some tests in connection with his application, but he offered no proof that he had passed those tests. Possibly the telephone company had a unique policy of never hiring an applicant who had had a broken bone. However, there are certainly other employers who do not have such a policy.

In other words, the mere fact that one prospective employer may have rejected plaintiff on account of his leg does not mean that all others would have done likewise (in fact, Counselor Book Corporation, the linoleum company and the Square Deal Company did not reject him) and certainly does not establish any general loss of earning capacity.

The district judge realized that plaintiff's statement as to why he was rejected was objectionable, for in Finding of Fact No. 8a he expressly stated that the finding was not based upon plaintiff's hearsay testimony as to what the telephone company's doctor told him. However, instead of saving or preserving

the finding this is fatal to it because it creates a fatal gap in the evidence required to support the finding since it means that the finding is not supported by even a single instance of the plaintiff's having been rejected for employment because of his injuries. Thus the finding that employers were reluctant "to employ a person with an injury of that late vintage" is not based upon evidence but is sheer speculation.

The inadequacy of the evidence relative to the Pacific Telephone Company rejection is also indicated by the unsatisfactory evidence as to what the starting pay would have been. Plaintiff said only that it was "around" $2.50 per hour. This was, of course, susceptible of exact proof and there was no reason for the court to accept plaintiff's guess. Furthermoere, even if plaintiff had been given a job by the telephone company, there was no evidence to indicate whether or not he would have been able to hold it. This is a very real question in view of plaintiff's attending college, for it seems highly unlikely that the telephone company would pay $2.50 per hour for part time work during summer vacations.

Since there is no evidence to support the award for loss of civilian wages in the amount of $2,000, the judgment should be reduced further by this amount.

IV. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF WILL SUFFER A FUTURE LOSS OF CIVILIAN PAY FOR AN ADDITIONAL THREE YEARS IN THE AMOUNT OF $1,440.

Finding of Fact 8b is as follows:

> "8. Plaintiff suffered and continues to suffer a loss of civilian wages after his release from active duty for which he is entitled to damages as follows:
>
> * * *
>
> "b. Future loss of civilian pay, for an estimated additional 3 years, less 9 months each year of college work, or 9 months, at $1.00 per hour, for 36 weeks, or $40.00 times 36 weeks - - $1,440.00"

As in the case of the award of $2,000 for loss of past civilian wages the award for loss of future wages could only have been based upon the rejection of plaintiff's application for a job with the Pacific Telephone Company and for the same reasons set forth in the preceding section of this brief this award is entirely without support in the record.

In finding a loss of wages of $1.00 per hour -- apparently a loss from $2.50 per hour to $1.50 per hour -- from June 1964 through February 1969, the district court has in effect found that plaintiff suffered a 40% loss of earning capacity for a period of four years and nine months after June 1964. That the court made this projection on

the basis of hearsay testimony as to a single rejection of an application of employment makes it clear that the court was speculating rather than drawing a reasonable inference from the evidence.

The allowance of damages for loss of civilian wages is also completely at variance with all of the medical evidence. It will be recalled that according to the Report of Board of Medical Survey dated April 29, 1964 (EX. P-2) the Board found that plaintiff was ready to resume the full and arduous duties of his rate and recommended that he be returned to full duty.

Dr. Nadamoto, who testified for the plaintiff, said that his examination revealed that plaintiff walked well, on tip toes and on the heels (TR. 127), that the muscle power of the left leg was good (TR. 127), that the range of motion of the left knee and ankle were within normal limits without associated pain (TR. 128) and that while the tilting of the ankle joint might cause trouble in the future it was impossible to say when this might be (TR. 133). There was nothing in Dr. Nadamoto's testimony to indicate any existing disability.

Dr. Gulledge, who testified for defendant, said that his examination revealed that plaintiff walked without

a limp (TR. 155) and that there was a full range of motion of the left hip, ankle and knee (TR. 156). Dr. Gulledge also testified that the condition of plaintiff's left leg should not interfere with his ability to carry on employment and that so far as his left leg was concerned he was qualified for a job requiring physical activity (TR. 158).

The allowance of $1,440.00 being nothing more than speculation based upon testimony that the district judge acknowledged was objectionable should not be allowed to stand and, therefore, the judgment should be further reduced by this amount.

V. THE DISTRICT COURT ERRED IN ALLOWING PLAINTIFF $2,000 FOR FUTURE PAIN AND SUFFERING BECAUSE OF AN ARTHRITIC CONDITION WHICH THE COURT FOUND WOULD BE CAUSED BY THE BOWING OF THE LEG BONES AND THE TILTING OF THE ANKLE BONES OF HIS LEFT LEG.

Finding of Fact number 11e is as follows:

"11. By reason of the collision and plaintiff's injuries, plaintiff is entitled to general damages as follows:

* * *

"e. Future pain and suffering, with reasonable medical certainty of arthritic conditions which will be caused by bowing of leg bones and tilting of ankle bones - - $2,000.00"

The medical testimony produced at the trial with respect to the plaintiff's injuries was given by Dr. Ichiro Nadamoto (TR. 121-37), called by the plaintiff, and Dr. William H. Gulledge, called by the defendant (TR. 152-88).

With respect to the likelihood that the plaintiff would suffer an arthritic condition in the future, Dr. Nadamoto testified on direct examination as follows:

"Q. Doctor, with reasonable medical certainty, could you say, would the bowing in Mr. Watson's left leg increase with the passage of time?

A. With reasonable medical certainty, I can say that the bowing will not increase, since the growth has

been attained.

MR. STIFEL: Since what?

THE WITNESS; Since the extent of the growth has been attained already and the fracture has healed well.

Q. (By Mr. Conklin) With reasonable medical certainty, will the tilting of the ankle mortise increase with the passage of time?

A. Likewise, I do not think it will increase with the passage of time.

Q. Will either of these two conditions you have described, Doctor, meaning thereby the leg bowing or the tilting of the ankle mortise, will either of these conditions with reasonable medical certainty cause Mr. Watson any difficulty in the future?

A. With reasonable medical certainty, I would be of the opinion that the ankle mortise tilting would be the one that may, in the future, give difficulty, give rise to difficulty at the ankle joint.

Q. Why?

A. Because of the major fact that the ankle is a weight-bearing joint and the stress and strain of the ankle joint has been altered in the left as compared to the right.

Q. Will it grind down the ankle bone?

A. I think the probability, with reasonable medical certainty, is that of a future arthritic condition of the ankle joint.

Q. Is there any way for you to tell with reasonable medical certainty when that might take place?

A. No, sir.

Q. Is there any reasonable medical certainty as to when that might start to take place?

A. No, sir.

Q. Will either the bowing of the leg or the tilting of the ankle joint, with reasonable medical certainty, cause any difficulty with the knee in the future?

A. Well, in medical knowledge, it is such that we know that with reasonable medical certainty if the foot is in difficulty, it may give rise to difficulty with the ankle, to the knee, and subsequently to the back. And knowing this to be true in different cases, of different conditions, I would say that with reasonable medical certainty it is my opinion that it may give rise to future knee difficulties.

Q. Can you tell when this might take place?

A. No, sir.

Q. With reasonable medical certainty, can you say

whether this tilting of the ankle mortise may cause pain in the future, or will cause pain in the future? In other words, we have established that the condition of arthritis is such that people sometimes have arthritis without pain.

A. Yes, sir.

Q. Well, what is the situation here, or can you tell?

A. Well, on the premise, on the statement that I made, traumatic arthritis in this ankle joint in all probability will give rise to pain.

Q. Would the same hold with regard to any joint?

A. Yes, sir. " (TR. 132-34)

On cross-examination, the following exchange took place:

"Q. Doctor, each time the term "reasonable medical certainty" is used, it is followed by the word "may," isn't it?

A. Yes, sir.

Q. So you don't mean to suggest to the Court that if these things may arise that they will with certainty arise?

A. There is nothing definite, but the probability is there.

Q. And it is also possible that these possibilities will not arise?

MR. CONKLIN: He used the term "probability," Counsel.

A. It is more probability than a possibility.

Q. (By Mr. Stifel) Now, the X-rays that you took showed that the bones are lined up well, do they not? The broken bones?

A. Yes, the X-rays showed the healing to be good with the results mentioned previously; that is, the slight medial bowing at the fracture site.

Q. And I think that you performed tests to determine the strength of the left leg?

A. Yes, sir.

Q. And did you compare the strength of the left leg with the right?

A. Yes, sir.

Q. And how did you do that?

A. The X-rays revealed that the musculature was good on the left leg.

Q. Did you determine the range of motion of the hip joint?

A. No, sir.

Q. Did you determine the range of motion of the knee joint?

A. Yes, sir.

Q. And what did you find there?

A. The measurement was not -- I mean, it was not clinically made except for gross clinical measurement, which was within normal limits.

Q. Did you determine the range of motion of the ankle bone?

A. Yes, I did.

Q. And would that be within the normal range?

A. I so stated previously. " (TR. 134-36)

Dr. Gulledge, called by the defendant, testified on direct examination as follows:

"Q. Now, Doctor, I call your attention to Exhibit D-2, and in particular to the point where the tibia approaches the uppermost bone in the ankle. Do you see which point I am trying to describe? I may not have described it medically accurately. But what is that joint called, if there is a name?

A. This joint? (Indicating)

Q. The joint between the tibia and the ankle bone.

A. That is called the ankle joint.

Q. The ankle joint?

A. Yes.

Q. Now, did you notice any tilt in that ankle joint?

A. Yes, there is a slight tilt as the result of the slight bowing, as the result of the fracture.

Q. A leg that has not been injured, let's say a normal leg, does that have any sort of a tilt whatsoever?

A. Yes, it does.

Q. In other words, the lower surface of the tibia is not horizontal, exactly horizontal?

A. No.

MR. CONKLIN: Excuse me, Counsel. Are you speaking in general?

MR. STIFEL: I am speaking in general.

Q. (By Mr. Stifel) In other words, in a normal and average individual, you would expect to find a slight degree of tilt, is that correct?

A. Tilt to the inside, yes.

Q. To the inside?

A. Yes.

Q. In which direction is the tilt of Mr. Watson's left leg? Is that also to the inside?

A. To the inside, yes.

Q. Now, how much difference did you note between the tilt in Mr. Watson's left leg and what you would consider to be normal? Is there any significant difference?

A. Well, there is a slight variation here. Some people have more tilt than others. I did not take X-rays of the other leg." (TR. 158-60)

* * *

"Q. Now, you have testified to a certain tilt in the ankle joint. Would you point out on the two exhibits what you were referring to?

A. Yes, this ankle joint here. (Indicating on X-ray film)

Q. You are now pointing to the right leg?

A. This is the right leg, yes. It is tilted a little bit in.

Q. How about the left?

A. And the same, perhaps a few degrees more on the left side.

THE COURT: When you say it is tilted towards the inside, -- I see what you mean -- the man is facing us?

THE WITNESS: Yes.

THE COURT: Is there a little bit more of a tilt on the left?

THE WITNESS: A few degrees. I didn't measure it out. I don't know that I could measure it accurately within the language --

Q. (By Mr. Stifel) Doctor, do you have an opinion based upon reasonable medical certainty as to whether the few degrees of additional tilt of the left leg would cause any problems to Mr. Watson in the future?

A. I don't think so; I don't think it will.

Q. Do you have an opinion as to whether a few additional degrees of tilt will cause arthritis in Mr. Watson's left leg in the future?

A. It is possible but I don't think that it will.

Q. Now, by use of the word "possible," could you be a little bit more specific? Do you mean a substantial possibility or a bare possibility? How would you characterize it?

A. Well, I would say a bare possibility. We are taught when we are learning about this business that an abnormal weight-bearing ankle to a joint can result in increased strain on that joint, with resultant arthritic changes taking place slowly over a period of years." (TR. 162-63)

* * *

"Q. Now, you have seen, I assume, in your 25 years of practice here many patients who have had broken tibias and fibulas, have you not?

A. Yes, sir.

Q. And I take it you have seen so many patients over a period of years who have arthritis of the ankle joint?

A. Yes, sir.

Q. Have you ever seen a patient with arthritis of the joint whom you believe had his arthritis result from a malalignment of a broken tibia and fibula?

A. No, I haven't.

Q. Doctor, I asked you whether or not you had an opinion as to whether the condition of the leg would affect Mr. Watson's employment, and I believe you said no. Were you referring just to the present or for the future as well?

A. Present and the future.

Q You don't feel that there will be an impairment of his ability to engage in employment in the future?

A. No." (TR. 164-65)

Other than the above testimony, there is nothing in the record which relates to the matter of the plaintiff suffering an arthritic condition in the future due to his injury. The district court found that the plaintiff will

suffer an arthritic condition in the future "with reasonable medical certainty." The question this court must answer is: Is there substantial evidence in the above contradictory testimony which can support the district court's finding to a "reasonable medical certainty"?

It is interesting to note that when Dr. Nadamoto was asked whether the bowing in plaintiff's leg would increase, he answered categorically:

> "With reasonable medical certainty, I can say that the bowing will not increase, since the growth has been attained." (TR. 132)

However, when asked whether the conditions of plaintiff's leg would give plaintiff difficulty in the future he answered:

> "With reasonable medical certainty, I would be of the opinion that the ankle mortise tilting would be the one that may, in the future, give difficulty, give rise to difficulty at the ankle joint." (TR. 133) (Emphasis added).

The doctor's use of the word "may" deprives his answer of any degree of real certainty whatsoever. Dr. Nadamoto did not say that he had ever seen a person with arthritis of the ankle joint caused by a broken leg. Furthermore, he did not state that the tilting that he found in the ankle joint was

a result of the broken leg or of the accident of June 1963.

Dr. Gulledge, on the other hand, testified that the average individual who has not had a broken leg has some degree of tilt at the ankle joint (TR. 159). While Dr. Gulledge found a slight variation in the tilt in plaintiff's left ankle (TR. 159 and 162) he stated that he did not think that this would cause plaintiff any trouble:

"Q. (By Mr. Stifel) Doctor, do you have an opinion based upon reasonable medical certainty as to whether the few degrees of additional tilt of the left leg would cause any problems to Mr. Watson in the future?

A. I don't think so; I don't think it will.

Q. Do you have an opinion as to whether a few additional degrees of tilt will cause arthritis in Mr. Watson's left leg in the future?

A. It is possible but I don't think that it will.

Q. Now, by use of the word "possible," could you be a little bit more specific? Do you mean a substantial possibility or a bare possibility? How would you characterize it?

A. Well, I would say a bare possibility. We are taught when we are learning about this business that an

abnormal weight-bearing ankle to a joint can result in increased strain on that joint, with resultant arthritic changes taking place slowly over a period of years." (TR. 163)

Furthermore, Dr. Gulledge testified that in his 25 years of practice he had seen many patients with broken legs and many patients with arthritis of the ankle joint but that he had never seen a patient with arthritis of the ankle joint whose arthritis he believed was due to a malalignment of a broken leg (TR. 164).

To be entitled to damages for future arthritis plaintiff was required to show that the arthritis would occur with reasonable medical certainty. In Condron v. Harl, 46 Haw. 66, the evidence showed that plaintiff had a ruptured intervertebral disc and that surgery was to be considered when plaintiff felt that living with the condition was too burdensome. The trial court permitted the jury to consider the expense of such surgery as an element of damages and upon appeal this was held to have been error:

> "The testimony was to the effect that plaintiff, on medical advice, was seeking to live with his disability, rather than to be operated upon. Surgery, it was testified, was an alternative to be considered "at such time as he felt that living with it was too burdensome." There was insufficient evidence to show with reasonable certainty that plaintiff's condition would, in future, call for an operation. Accordingly, it was error to

> submit to the jury the matter of an award for the expenses incident thereto." (p. 76)

In the present case the evidence does not support the court's finding that plaintiff will with reasonable medical certainty suffer from arthritis as a result of the accident and, therefore, the allowance of $2,000 for this item should be disallowed and the amount of the judgment reduced accordingly.

VI. THE DISTRICT COURT ERRED IN AWARDING PLAINTIFF $1,750 IN EXEMPLARY DAMAGES BECAUSE THERE WAS NO EVIDENCE THAT DEFENDANT WAS GUILTY OF SUCH NEGLIGENCE AS TO WARRANT SUCH DAMAGES AND BECAUSE THE AMOUNT ALLOWED WAS GROSSLY EXCESSIVE. THE COURT ALSO ERRED IN DENYING DEFENDANT'S MOTION TO AMEND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE AWARD OF PUNITIVE DAMAGES.

Finding of fact number 10 is as follows:

> "10. Defendant had been and was at the time of collision driving his car in a grossly negligent manner, and heedless of the safety of others, for which exemplary damages of $1,750 are assessed against defendant."

The findings of fact and conclusions of law were filed May 3, 1966, and on May 13, 1966, defendant filed a motion to amend the findings and conclusions in respect to the award of exemplary damages (R. 53). At the hearing on said motion defendant moved that he be permitted to offer evidence as to defendant's financial standing. On May 23, 1966, the court filed an order denying the motion to amend the findings and conclusions and denying the motion to reopen the trial (R. 62).

a. Defendant's conduct did not warrant an award of punitive damages.

In some cases punitive damages have been allowed because the rules pertaining to damages did not permit the plaintiff to be adequately compensated by

compensatory damages (Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351, 353-54 (1885)).

However, in the instant case substantial compensatory damages were awarded for pain, suffering, loss of wages, medical expense, disability, shock, fright, embarrassment, discomfort, and inconvenience. In fact, there were twelve separate items of compensatory damages set forth in the district court's findings of fact. Therefore, it is clear that the $1,750 punitive damages were awarded solely for the purpose of punishing the defendant and were not intended in any way to include elements of compensation.

Exemplary damages are not recoverable for mere negligence (22 Am.Jur.2d, Damages, § 251). Furthermore, to warrant exemplary damages the negligence must have been so great as to show an entire want of care:

> "Not every case of gross negligence will authorize the allowance of punitive damages. It has been held that to warrant the allowance of exemplary damages, the negligence must be so gross as to evince an entire want of care and that it must have something of a criminal character. According to some of the cases, exemplary damages may not be allowed unless the negligence is so gross as to amount to positive bad faith, to be deemed equivalent to an evil intent, wantonness, recklessness, or to indicate malice." 22 Am. Jur. 2d Damages § 252.

In Hawaii the basis for allowing punitive damages was discussed in Bright v. Quinn, 20 Haw. 504 (1911), where the court laid down the following rules:

> "it is now too well established to admit of argument that in actions of tort punitive damages may, under certain circumstances, be awarded in addition to such sum as the plaintiff may be found entitled to purely by way of compensation for his injuries and suffering. . . . Such damages may be awarded in cases where the defendant 'has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations'; or where there has been 'some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences'. In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them. . . ."

See also Glover v. L. K. Fong, 40 Haw. 503 (1954); Howell v. Asso. Hotels, etc. et al., 40 Haw. 492 (1954); Jendrusch v. Abbott, 39 Haw. 506 (1952).

The record in the instant case concededly shows that the defendant was not acting with utmost caution and care at the time of the accident. But his conduct was not reprehensible or reckless, and the drunken driver or the speeding driver is certainly much more

deserving of serious punishment than the exhausted driver who, while proceeding slowly along the street, strikes a pedestrian because he is momentarily overcome by sleepiness.

In the present case defendant admittedly was sleepy (TR. 30-32) and this sleepiness caused the accident. However, the sleepiness was due to hard work (TR. 31-32) and there was no evidence that defendant was intoxicated. Indeed police officer Peiper testified that defendant did not appear to be under the influence of alcohol (TR. 23). Plaintiff's witness Moore testified that defendant "was not speeding at any time" (TR. 58). Furthermore, it is obvious that far from being indifferent to the public, defendant had reduced his speed to the point where he was travelling only ten or fifteen miles per hour as he drove along Kalakaua Avenue towards the scene of the accident (TR. 34). He had slowed down even further before the impact, for although defendant did not see plaintiff until about the time of the impact, he was able to bring his car to a complete stop without skidding and so that the rear wheels were still in the crosswalk in which the accident occurred (TR. 13, 14 and 23).

This is not a picture of a malicious, wanton, malefactor whose conduct is so reckless as to require imposition of a large fine. Instead it is a picture of a tired workingman who, in spite of slowing his automobile to a crawl, had the misfortune of having his eyes closed by sleepiness for just an instant too long so that he was unable to avoid striking the plaintiff. These facts do not warrant the imposition of punitive damages.

Punitive damages are not a favorite of the law and the power to award them should be exercised with great caution (22 Am.Jur.2d, Damages, § 238). It is submitted that the trial court did not exercise such caution in the present case. That there may have been evidence of negligence or even of negligence that some persons would call gross does not preclude the court from disallowing the item in question. Although there may be some evidence supporting the trial court's finding, nevertheless if the reviewing court upon considering all of the evidence feels that a mistake has been made, the finding should be set aside as clearly erroneous (United States v. United States Gypsum Co., 333 U.S. 364, 68 Sup.Ct. 525, 42 L. Ed. 46 (1948)).

The cases indicate that excessive speed or intoxication or both may warrant punitive damages. In Smith v. McNulty, 293 F.2d 924, defendant had driven at "a very high rate of speed", crashed into the rear of plaintiff's car, fled the scene at 80 miles per hour and had been found to be drunk, surly and belligerent. In Morgan v. Bates, 390 P.2d 486, defendant after drinking for several hours drove, with plaintiff as a passenger, at speeds up to 90 miles per hour, lost control and rolled over. Punitive damages of $1,000 were allowed. In Reid v. Strickland, 242 S.C. 466, 130 S.E.2d 416, defendant rounded a blind curve at 60-65 miles per hour in a 35 mile per hour zone and hit plaintiff's car. In Madison v. Wigal, 18 Ill. App.2d 564, 53 N.E.2d 90, defendant while under the influence of alcohol drove onto the wrong side of the highway at 50 miles per hour in a 35 mile per hour zone and collided with plaintiff.

In each of these cases there was an obvious element of conscious recklessness which is completely lacking in the present case.

The cases just cited should be compared with Baker v. Marcus, 201 Va. 905, 114 S.E.2d 617, where defendant after drinking enough vodka to have its odor on her breath when the police arrived, drove into the rear

of plaintiff's car. The police considered her intoxication "borderline" and, therefore, charged her only with reckless driving. In setting aside an award of punitive damages against defendant the court said:

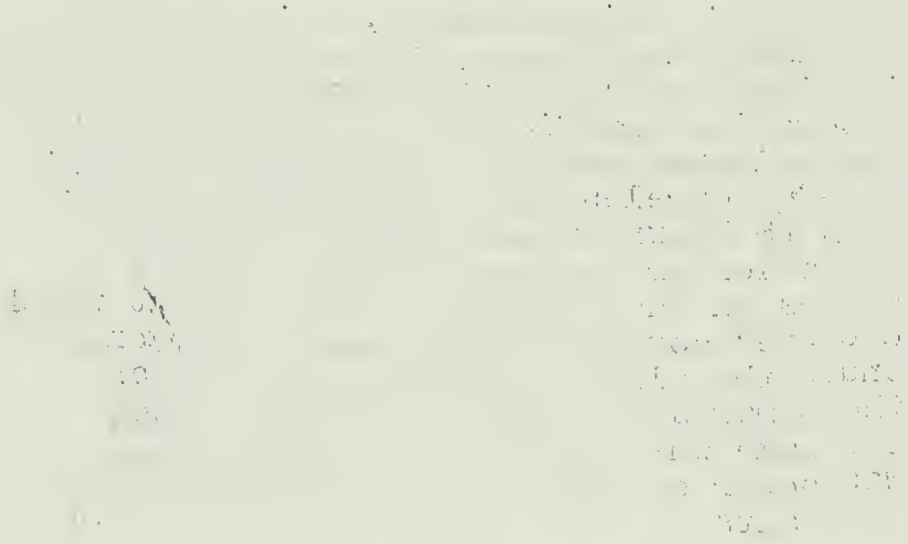
> "One who knowingly drives his automobile on the highway under the influence of intoxicants, in violation of a statute, is, of course, negligent. It is a wrong, reckless and unlawful thing to do; but it is not necessarily a malicious act. Evidence of intoxicaton [sic] may be offered to show the negligence of a driver; but in the absence of proof of one or more of the elements necessary to justify an award for punitive damages, it may not be used to enlarge an award of damages beyond that which will fairly compensate the plaintiff for the injury suffered.
>
> * * *
>
> "In the case before us, Mrs. Baker did not see the Marcus car and deliberately run into it. She had nothing personal against Marcus, nor the desire to do anyone harm. The evidence shows a typical rear end collision as a result of a lack of the use of ordinary care and caution. That Mrs. Baker did not keep a proper lookout is manifest, and her failure to do so constituted negligence. Her conduct may have been partly due to the intoxicants which she had imbibed; but there is nothing to show that she acted in a spirit of mischief, criminal indifference, or conscious disregard of the rights of others. Her conduct, after the collision, showed no motive to injure the plaintiff, or ill will toward him. She was then injured, and according to all the testimony she was dazed and hysterical. In momentarily taking her eyes off the road, she was

> guilty of a misadventure, which amounted to simple negligence, and a mistake which is likely to cause an injurious result in automobile traffic at any time and place. The evidence presents no indicia of purposeful carelessness, deliberate inattention to known danger, or any intended violation or disregard of the rights of others on the highway. The accident which occurred could have happened to anyone under the circumstances mentioned, and the damages inflicted would have been the same whether or not the wrongdoer was sober or under the influence of intoxicants.
>
> "For the reasons stated, we are of opinion that the trial court erred in submitting the question of punitive damages to the jury. Therefore, insofar as the judgment and verdict awarded punitive damages, the judgment is reversed and the verdict set aside, and the judgment, insofar as itawarded compensatory damages, is affirmed, and final judgment here entered accordingly. . . ." (pp. 621-22).

Obviously the mental attitude of the defendant in the present case was more closely akin to that of the defendant in Baker v. Marcus than to those of the defendants in the cases cited earlier.

From the evidence of the defendant's conduct in the record, there is insufficient evidence to support a finding that the defendant was guilty of such extreme "gross negligence" as to be deserving of a $1,750 fine.

b. Even if some exemplary damages should have been allowed the amount of $1,750 was grossly excessive.



One of the factors to be considered in determining the amount of exemplary damages is the punishment fixed by the criminal code for the act complained of (22 Am.Jur.2d, Damages, § 266).

Revised Laws of Hawaii, § 311-1 provides:

> "Whoever operates any vehicle or rides any animal carelessly or heedlessly of the rights or safety of others, or in a manner so as to endanger or be likely to endanger any person or property, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

If the defendant was, in fact, in violation of the above statute, the monetary fine would at the very most be limited to $1,000. However, when it is considered that the Hawaii statutes provide the same $1,000 fine, as an alternative to imprisonment or as an addition thereto, for the crimes of intermediate assault, bribery, extortion, forgery, gross cheat, malicious injury, and driving under the influence of liquor, (see Revised Laws of Hawaii (1955) §§ 264-5, 265-2, 283-8, 285-9, 289-6, 296-1, 311-28) all of which involve intent and moral turpitude, it seems obvious that the fine in the present case should be substantially less than the $1,000 maximum.

Neither intent nor moral turpitude was involved in the acts of the defendant in the instant case for which

he has been, in effect, fined $1,750. Of course, the $1,750 fine would be in addition to whatever other fine may have been imposed by the traffic courts arising out of the same incident. In sum, the defendant has been fined an amount which is far in excess of, and completely out of proportion to, the criminal penalties provided for his actions. This factor apparently was not considered by the court in its award of $1,750 for punitive damages.

c. The trial court erred in denying defendant's motion to reopen the trial to introduce evidence of defendant's financial standing.

During the course of the hearing on defendant's motion to amend the findings of fact and conclusions of law defendant moved to be allowed to introduce evidence of defendant's financial standing. This motion was denied (R. 62).

The financial standing of defendant is a proper factor to be considered in a determination of the amount of exemplary damages:

> "Although there are some contrary holdings, in most jurisdictions evidence of the financial condition of the defendant is admissible and may be considered by the jury in determining the amount of exemplary or punitive damages to be allowed

> and what amount of punishment would be inflicted thereby on the theory that the allowance of a given sum would be a greater punishment to a man of small means than to one possessing larger wealth." (22 Am.Jur.2d, Damages, § 322, p. 422).

The facts included in the offer of proof made in connection with the motion to reopen the trial show that the allowance of $1,750 exemplary damages against defendant would impose an unreasonable hardship upon him and that it would be a mistake to allow the trial court's finding in this respect to stand.

CONCLUSION

There is no evidence that plaintiff suffered any loss of his Navy base pay as a result of the accident and the so-called collateral source doctrine is not applicable because plaintiff was on duty and performing services during most of the period subsequent to the accident. Therefore, the court's findings of fact numbers 7a and b was not supported by any evidence and the amount of the judgement should be reduced by $1,850.[1]

The findings that plaintiff lost $2,000 of civilian pay after leaving the Navy up to February 1966 and that he will lose an additional $1,440 in the next three years could only have been based upon improper hearsay testimony as to the reason for plaintiff's rejection by Pacific Telephone Company and upon plaintiff's guess as to the rate of pay offered by the telephone company, and even if that testimony had been admissible,

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1. It is clear that the appellate court has the power to order judgment for a stated amount where the effect of an error by the trial court in assessing damages can be determined (6 Moore, Federal Practice ¶ 59.05[3], p. 3752).

it would not have supported the award. Therefore, finding of fact number 8 was clearly erroneous and the amount of the judgment should be further reduced by $3,440.

The finding that plaintiff will with reasonable medical certainty suffer from arthritis of the left ankle as a result of the accident for which he is entitled to $2,000 was not supported by the record and was clearly erroneous and the amount of the judgment should be further reduced by $2,000.

The finding that defendant was so grossly negligent as to entitle plaintiff to $1,750 in exemplary damages was clearly erroneous and the judgment should be further reduced by $1,750 or, in the alternative, the case should be remanded for the reception of evidence as to defendant's financial standing and a redetermination of the amount of exemplary damages.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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